

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

FOOD EXPRESS, INC.

Employer

and

Case 36-RC-5959

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION #58, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All employees employed by the Employer at its Vancouver and Longview, Washington, facilities, including dispatchers and plant clerical employees;

Excluded: All guards and supervisors as defined by the Act.

The Employer is engaged in the transportation of various bulk commodities, including flour, corn starch, dry and liquid ingredients for paper mills, and caustic soda. The Employer's headquarters is in Arcadia, California; it maintains facilities in several states, including its facilities in Vancouver and Longview, Washington, involved herein. The petition seeks a unit of all employees employed in Vancouver and Longview. At hearing, the parties stipulated that the appropriate unit includes at least all

truck drivers, mechanics, yard/warehouse employees, and wash bay technicians employed by the Employer at its Vancouver and Longview facilities. At issue are two dispatchers and two clericals. The Employer contends that the dispatchers are statutory supervisors and/or confidential employees, and further that they lack a community of interest with the bargaining unit. The Employer also contends that the clerical employees are confidential employees and that they are office clerical employees who lack a community of interest with the bargaining unit.

The Employer has two facilities in Vancouver, one at the Port of Vancouver, and the other about two miles away on Fruit Valley Road. The Port of Vancouver facility consists of a 10,000 square-foot warehouse and a yard with rail service. There is a 500 square-foot office area within the warehouse. The Fruit Valley Road facility consists of a 13,000 square foot building which houses a maintenance shop and food-grade tank wash, and a parking area for trucks. In Longview, the Employer rents parking spaces in a graveled yard for a few of its trucks, and four drivers operate out of that site.

There are approximately 31 drivers working out of Vancouver and Longview. There are three yard/warehouse employees, who work at the Port of Vancouver location. There are three mechanics, who all work at the Fruit Valley Road location, as does the one wash bay technician. In addition, there are two dispatchers and two clericals at issue, all of whom work at the Port of Vancouver facility. William Legler is the Vancouver terminal manager. He has final authority to hire, fire, and discipline, and all of the employees involved herein report to him.

The yard/warehouse employees work at the Port of Vancouver facility. They work eight hours a day, and are paid from \$9.30 to \$11.00+ per hour. The mechanics work Monday through Friday; each works every third Saturday and is on call for the rest of that weekend. They are paid \$14.60 per hour. There is a lead mechanic who establishes a work schedule for the afternoon shift and orders parts.¹ The wash bay technician works 7:00 a.m. to 5:00 p.m., or sometimes 6:00 a.m. to 2:00 p.m. His wage rate is not in the record. All full-time employees receive the same benefits

All but one of the Employer's approximately 30 trucks are engaged in short hauls. Drivers normally work 50 to 55 hours over five or six days per week. The drivers' wages start at \$11.60 per hour and go up to \$13.60. About 25% of the routes are regularly assigned. Different training and skills are required for transporting different commodities, as the drivers must know how to load and unload as well as how to drive the truck. The Employer provides on-the-job training. Not all drivers are trained for all commodities. There is a regular crew assigned to hauling caustic materials, including one particular driver and three or four others who fill in for him as needed.

Sid Lewis and Mike Entwhistle are the dispatchers at issue. Both have been employed as dispatchers for at least five years. The dispatchers work in rotation, four days on and four days off, 6:00 a.m. to 6:00 p.m. The Employer's operations run seven days a week. The dispatchers work in the office area in the Port of Vancouver warehouse. It is an open area with a few room dividers separating some parts of it. Legler also works in that office.

Each morning on the way in to work, the dispatcher on duty stops at the Fruit Valley Road facility to pick up paperwork, including bills of lading and the drivers' daily logs. The dispatcher then reviews those documents in the office. Information from the drivers' logs is entered into a computer program. The dispatcher also transcribes information from the bills of lading. Every day between about noon and 1:00 p.m., the dispatcher starts preparing a sheet for the next day, listing the runs that will need

¹ There is no contention by either party that he is a supervisor. The record does not so indicate. Accordingly, he is included in the unit.

to be made and assigning drivers and equipment to the runs. In making such assignments, the dispatcher must take into consideration the number of hours a driver has already driven,² whether a particular driver is rated qualified/trained for a particular type of equipment, and whether a driver has requested a day off. The drivers call in each afternoon before 5:00 p.m. to get their assignments for the next day. The drivers communicate with the dispatchers using Nextel radio/telephones. Thus, the dispatchers' primary duties are to process the paperwork related to the drivers' activities, and to assign the drivers and equipment to jobs to be done the following day.

Legler testified that, "I don't interfere with [the dispatchers] as much as I used to. I don't interfere with them at all anymore. I've learned not to micro-manage things, and it works better. They have full authority to manage the drivers." Legler also testified that over the past five or more years, he has had frequent conversations with the dispatchers, that they have discussed the drivers' qualifications, that the dispatchers are well aware of Legler's assessments of the drivers, and that in the past the dispatchers discussed assignments with Legler more often than they do now.

With respect to hiring, Legler testified that he interviews all candidates. Sometimes, although not "a lot," if he has doubts about a candidate, he will have Lewis or Entwistle also interview the candidate, and then get their opinion. He could not recall ever having gone against a recommendation from one of the dispatchers on those occasions when he sought one.

With respect to discipline, Legler testified that he alone gives written warnings, but that the dispatchers can give verbal warnings or counseling. No record is kept of such verbal warnings or counseling. Legler expects the dispatchers to deal with any attendance problems. The Employer does not have any established progressive disciplinary policy regarding attendance.

Dispatchers can call in an off-duty driver or a yard employee if needed. This can happen if during the day the need arises to deliver a load, or if a yard employee calls in sick and someone is needed to fill in. The dispatcher does not have to consult with Legler before calling an employee in. Yard employees receive an overtime premium; a yard employee called in as a replacement may thus be subject to overtime pay. Drivers do not receive an overtime premium.

Drivers are paid by the hour. Thus, their assignments from the dispatchers can affect their pay, although it does appear that drivers regularly work overtime, and that there is a regulatory maximum. There appears to be a narrow range of variation in the amount of overtime worked. Drivers who transport caustic substances receive an additional 50 cents per hour, and dispatchers can choose among those qualified for such runs.

The record does not establish that the drivers all regularly have face-to-face contact with the dispatchers, in that the dispatchers spend all their time in the office at the Port of Vancouver, and the drivers call in for their next day's assignments and then pick up their trucks at the Fruit Valley Road location or in Longview. Drivers who go to the Port of Vancouver location to pick up a load do not routinely get out of their trucks and enter the office. Legler testified that if a driver is overtired or otherwise unfit for duty, the dispatcher can decide not to send that driver out, although he did not explain how that circumstance would come to the dispatcher's attention or what the decisional process would be.

The two clerical employees at issue are Marlene Lewis and Susan Neeley, who also work in the office in the warehouse at the Port of Vancouver facility. They report to Legler.

² The Department of Transportation requires that a driver not drive more than 70 hours in an 8-day period.

Lewis is responsible for billing customers. She verifies information on bills of lading, prints invoices and statements and mails them, and files all billing information. She calls customers who have not paid in a timely manner. Lewis also answers questions from other employees regarding insurance matters and payroll discrepancies, and hands out insurance forms to employees. She does the payroll. Lewis maintains the personnel files; that is, she places documents in the files and retrieves documents from them, for Legler. The files are kept in a locked cabinet, to which she, Legler, and the two dispatchers have keys. Legler places disciplinary letters and employees' medical records in sealed envelopes before giving them to Lewis to file. Legler types his own correspondence, but he has Lewis proofread everything for him, presumably including the personnel documents that end up in sealed envelopes. If Lewis is unavailable, Legler has a dispatcher proofread. Lewis is paid \$10.00 per hour, and works part-time, 12 days per month - two days a week, plus the first and the sixteenth. Because she works part-time, she is not eligible for benefits.

The Employer's warehouse is adjacent to the entrance to the Port of Vancouver. Just outside the Employer's office is a truck scale, for which Neeley is the regular weighmaster. She sits at a desk next to a sliding window adjacent to the truck scale. Neeley has brief conversations with truck drivers through the sliding window, and she gives each a scale ticket after completing the weighing procedure. Neeley is a certified weighmaster, as are the two dispatchers and Marlene Lewis. The scales are also open to the public. An Employer witness testified generally that the trucks weighed on the scale are "primarily" non-Employer trucks, but that most, but not necessarily all, of the Employer's trucks leaving the Port of Vancouver facility are weighed on their way out. It appears that the weighmaster function is Neeley's primary duty. Neeley works four days a week, ten hours a day. Lewis regularly acts as weighmaster on Fridays in Neeley's absence. Neeley is paid \$10.00 per hour and receives the same benefits as other employees. In addition to her weighmaster duties, Neeley prepares bills of lading and enters the information from the drivers' daily logs into the computer. She also performs an inventory function regarding commodities in the warehouse. As needed, she assists Lewis with the billing. Neeley reports directly to Legler.

Both Lewis and Neeley have regular contacts with bargaining unit employees. They have brief conversations with drivers at the scales. Yard/warehouse employees regularly enter the office area, as those employees keep their warehouse records on clipboards hung on the wall near the coffee machine. Drivers sometimes enter the office area, and occasionally a mechanic from the Fruit Valley Road facility visits the office. Neeley has contacts with yard warehouse employees regarding inventory matters, and Lewis has contacts with other employees regarding payroll discrepancies and insurance matters.

The Employer has a human resources department at its headquarters in California. The Employer's labor relations policies emanate from headquarters. Legler is sometimes involved in telephonic discussions of labor relations policies with persons at headquarters. No one else in the Vancouver office participates in those discussions along with Legler.

Supervisory Issue.

Section 2(11) of the Act defines a "supervisor" as:

. . .[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The supervisory indicia arguably involved herein are authority to hire, discipline, assign overtime, or responsibly direct employees. It is clear that the dispatchers do not hire employees, nor do they effectively recommend hiring. Legler's testimony establishes that he interviews all job candidates, and only occasionally asks one of the dispatchers to also interview a candidate, apparently for the purpose of helping resolve his own doubts in close cases. In these circumstances, it cannot be said that the dispatchers effectively recommend hire. *ITT Lighting Fixtures*, 265 NLRB 1480 (1082).

The dispatchers verbally warn or counsel employees, but no record is kept of such warnings or counseling. The Board has held that absent evidence that oral reprimands have a significant effect on the employee's employment status or that they impair a reasonably expected employment benefit, authority to issue oral reprimands does not establish statutory supervisory status. *Tucson Gas & Electric Company*, 241 NLRB 181, 182 (1979). There being no such evidence here, I conclude that the dispatchers do not have statutory authority to discipline employees.

The dispatchers designate which driver will do which run. They do so based on their knowledge of the drivers' training to handle the particular commodity to be transported, and the number of hours which the drivers have already worked during the relevant eight-day period. The dispatchers have worked side-by-side with Legler for at least five years; in the past he was closely involved in the process of assigning the drivers, although currently he leaves it to the discretion of the dispatchers. Assigning a driver to a truck is basically a matter of ascertaining which driver, among those rated qualified for a particular type of load, is available. This is a routine activity that does not require independent judgment. It appears that the work is largely repetitive, involving repeated runs to and from repeat customers. I note also that Legler is present in the office with the dispatchers, and readily available for consultation.

As to assignment of overtime, it appears that the dispatcher calls in a replacement employee when the scheduled employee is ill. Likewise, scheduling of work often requires overtime, especially by the drivers. The record does not reflect that the "decisions" to schedule overtime call for independent judgment. The work is there and must be accomplished. As to who will perform the work, again it is an assignment function, based on training to drive a particular commodity and available hours. It appears that overtime is distributed roughly equally. No independent judgment has been shown.

I conclude, therefore, based on the entire record, that the dispatchers herein are not supervisors within the meaning of the Act.

Confidential Employee Issue.

The Board's long-established test for determining whether an employee is a confidential employee is whether the employee assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. *The Bakersfield Californian*, 316 NLRB 1211 (1995). Merely having access to confidential information does not establish confidential status. *Rhode Island Hospital*, 313 NLRB 343 (1993).

Here, there is no evidence that the dispatchers and/or the clerical employees assist or act in a confidential capacity to any such person. Legler does not formulate, determine, and effectuate management policies in labor relations; those activities are conducted at the Employer's headquarters in Arcadia, California. Legler simply follows management policies which are put into effect by higher authority. The Board assesses the considerations "formulate, determine, *and* effectuate" in the conjunctive; it is clear that Legler neither "formulates" nor "determines" labor relations policy for the Employer, even assuming arguendo that he "effectuates" such policy. Thus, I conclude that the dispatchers and the clerical employees are not confidential employees. *Weyerhaeuser Company*, 173 NLRB 1170 (1968); *B.F. Goodrich Company*, 115 NLRB 722 (1956).

Thus, I conclude that the dispatchers and the clerical employees are not confidential employees.

Dispatchers: Community of Interest Issue.

The dispatchers report to the same supervisor as do all other employees. Their wages are similar and they share the same benefits. Although the nature of their duties and job skills differ, their work is closely functionally integrated with that of the bargaining unit employees. Both dispatchers were previously employed by the Employer as truck drivers. The dispatchers have regular and frequent work contacts with the drivers by radio, and in-person contacts with the yard employees at the Port of Vancouver location. Moreover, no labor organization is seeking to represent the dispatchers separately. I conclude, therefore, that the dispatchers share a community of interest with the other employees and that it is appropriate to include them in the unit.³

Clerical Employees: Office Clerical and Community of Interest Issues.

As a general proposition, office clerical employees are excluded from blue collar units, while plant clericals are included.

The Board generally finds that plant clericals are clericals who are employed at locations other than the employer's main administrative offices, in jobs identified with "production" operations; work under the same supervision as production personnel, and perform functions closely allied to the production processes or to the daily operations of the production facilities at which they work; have hours of work generally tied to those of the production shifts on which they serve; have daily contacts with production personnel; do not interchange with office clerical employees, and in most cases are not required to have the same kind of skills. Office clerical employees generally work in a separate, main administrative area performing clerical tasks associated with such functions as purchasing, accounting, invoicing, public relations, and personnel services. *Weyerhaeuser Company*, supra. Ultimately, these labels are attached on the basis of community of interests with the "production" unit.

Accordingly, it is clear that Neeley is a plant clerical employee. She works under the same supervision as the bargaining unit employees, has regular contacts with them, and performs clerical work closely associated with the "production" (hauling, storing) process i.e., she weighs the trucks of most drivers as they leave the Port of Vancouver terminal. This is her primary function. Her in-house weighmaster function is a brief, but integral, part of the delivery process. Weighing for the public is a revenue-generating service, i.e., more of a "production" process than an office "overhead" operation.

Lewis is something of a hybrid. She works under the same supervision as bargaining unit employees and has regular contacts with them, but some of her duties are more related to typical administrative functions than to the "production" process. However, she is isolated from all other administrative employees (they are in California), works side-by-side with the dispatchers and Neeley, and regularly performs the duties of weighmaster one day a week. Further, she is paid the same wage rate as Neeley. The Board has said that, "the plant clerical-office clerical distinction is rooted in community of interest concepts."⁴ Here, Lewis shares a community of interest with Neeley, the dispatchers, and other

³ Of course, as always, the unit sought by a petitioner need only be "appropriate;" if it is, the petitioner may have the unit it seeks. More than one unit can be appropriate. The unit selected need not be the "most" appropriate.

⁴ *National Medical Hospitals, Inc.*, 215 NLRB 821 (1974), citing *Minneapolis-Moline Company*, 85 NLRB 597 (1949) and *W.C. Norris Manufacturer, Inc.*, 73 NLRB 838 (1947).

bargaining unit employees in that she works side-by-side with them under common supervision, has the same wage rate as Neeley and similar to that of other unit employees, and has frequent contacts with unit employees. In the circumstances herein, I conclude that Lewis is more like a plant clerical than an office clerical. Moreover, were I to exclude Lewis from the unit, she would be the only unrepresented employee.

Given the Petitioner's aforementioned right to select any appropriate unit, and the factors discussed immediately above, I find it appropriate to include Lewis in the unit.

There are approximately 42 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION #58, AFL-CIO.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Officer-in-Charge who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Portland Subregional Office, Koin Center, Room 401, 222 S.W. Columbia Street, Portland, Oregon 97201-5878, on or before January 18, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by January 25, 2000.

DATED at Seattle, Washington, this 11th day of January, 2000.

/s/ PAUL EGGERT

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